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Health And Welfare Trust Fund for Northern California, et al.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPERATING ENGINEERS' HEALTH AND
WELFARE TRUST FUND FOR NORTHERN
CALIFORNIA; DAN REDING and JAMES E.
MURRAY, Trustees;

PENSION TRUST FUND FOR OPERATING
ENGINEERS; DAN REDING and JAMES E.
MURRAY, Trustees;

PENSIONED OPERATING ENGINEERS'
HEALTH AND WELFARE TRUST FUND; DAN
REDING and JAMES E. MURRAY, Trustees;

OPERATING ENGINEERS AND PARTICIPATING
EMPLOYERS PRE-APPRENTICE, APPRENTICE
AND JOURNEYMEN AFFIRMATIVE ACTION
TRAINING FUND; DAN REDING and JAMES E.
MURRAY, Trustees; and

OPERATING ENGINEERS LOCAL UNION NO. 3
VACATION, HOLIDAY AND SICK PAY TRUST
FUND; DAN REDING and JAMES E. MURRAY,
Trustees,

Plaintiffs,

v.

BAY AREA COMMERCIAL SWEEPING, INC., a
California Corporation; STEPHANI SERRANO, an
individual (aka STEPHANI SERRANO MEZA);
BALDEMAR GOMEZ, individually and doing

Case No.

COMPLAINT

business as BAY AREA COMMERCIAL
SWEEPING,

Defendants.

Parties

1. The Operating Engineers' Health and Welfare Trust Fund (which includes the Assistance and Recovery Program, Inc.) ("Health Fund"); Pension Trust Fund for Operating Engineers (which includes the Pension Plan for the Pension Trust Fund for Operating Engineers, and the Operating Engineers Annuity Plan, and the Rehabilitation Fund) ("Pension Fund"); Pensioned Operating Engineers' Health and Welfare Trust Fund (which includes an Administration Fund) ("Pensioned Health Fund"); Operating Engineers and Participating Employers Pre-apprentice, Apprentice and Journeymen Affirmative Action Training Fund ("Affirmative Action Training Fund"); and the Operating Engineers Local Union No. 3 Vacation, Holiday and Sick Pay Trust Fund (which includes an Administration Fund) ("Vacation Fund") are employee benefit plans as defined in the Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3), and are multi-employer plans as defined by ERISA § 3(37)(A), 29 U.S.C. § 1002(37)(A). Dan Reding and James E. Murray are Co-Chairmen of the Joint Boards of Trustees of the Health Fund, Pension Fund, Pensioned Health Fund, Affirmative Action Training Fund, and Vacation Fund, and have authority to act on behalf of all Trustees of those Funds. The Funds and their fiduciaries are together referred to herein as "ERISA Plaintiffs" or "Plaintiffs."

2. Bay Area Commercial Sweeping, Inc., a California corporation, Stephani Serrano, an individual (also known as Stephani Serrano Meza), and Baldemar Gomez, individually and doing business as Bay Area Commercial Sweeping (collectively, "Defendants") are employers by virtue of ERISA § 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29 U.S.C. § 152(2), 29 U.S.C. § 152(2).

Jurisdiction

3. Jurisdiction exists in this Court over the claims asserted by ERISA Plaintiffs by virtue of ERISA § 502, 29 U.S.C. § 1132, in that ERISA Plaintiffs seek to enforce the provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief under ERISA.

Northern California Construction Agreement (the “Independent Agreement”) with the Union, which incorporates the Master Agreement (“Master Agreement”) between the Union and the Signatory Associations. Defendant Baldemar Gomez listed the Individual Employer (Company Name) as “Bay Area Commercial Sweeping.” Plaintiffs are informed and believe that this entity was a sole proprietorship, as California Secretary of State records indicate that Defendant Bay Area Commercial Sweeping, Inc. was not registered until March 2018. In addition, paragraph 10 of the Independent Agreement also provides that if the signing employer (“Bay Area Commercial Sweeping”) sells or transfers any or all of its assets, stock, and/or operations, the buyer or transferee (“Bay Area Commercial Sweeping, Inc.”) shall recognize the Union as the Employees' bargaining agent and will assume the Independent Agreement. Paragraph 12 of the Independent Agreement states that the principal shareholder(s) of Defendant Bay Area Commercial Sweeping, Inc. personally guarantee all amounts claimed herein. Plaintiffs are informed and believe that Defendants Stephani Serrano and Baldemar Gomez are the principal shareholders of Defendant Bay Area Commercial Sweeping, Inc.

10. On or about June 2018, Defendant Stephani Serrano on behalf of Defendant Bay Area Commercial Sweeping, Inc. also entered into the Sweeper Agreement (“Sweeper Agreement”) with the Union. The Independent Agreement, Master Agreement and Sweeper Agreement (collectively, “Bargaining Agreements”) which incorporate the terms of the Trust Agreements establishing the Trust Funds (“Trust Agreements”), require Defendants to provide employer contributions to Plaintiffs’ Trust Funds, to the Union for union dues, and to the Bargained Entities more fully described in the Bargaining Agreements. ERISA Plaintiffs are third-party beneficiaries of the Bargaining Agreements.

11. Plaintiffs are informed and believe that Defendant Baldemar Gomez, individually and doing business as Bay Area Commercial Sweeping, and Defendant Bay Area Commercial Sweeping, Inc. do not maintain separate corporate identities and that Defendant Baldemar Gomez, individually and doing business as Bay Area Commercial Sweeping, and Defendant Bay Area Commercial Sweeping, Inc. are operating with the same ownership. Plaintiffs are further informed and believe that Defendant Baldemar Gomez, individually and doing business as Bay Area Commercial Sweeping, and Defendant Bay Area Commercial Sweeping, Inc. may also share the same location, employees, equipment, and

1 customers. As such, Plaintiffs are informed and believe that Defendant Baldemar Gomez, individually
2 and doing business as Bay Area Commercial Sweeping, and Defendant Bay Area Commercial
3 Sweeping, Inc. are a single employer and/or are continuations or alter egos of one another.

4 12. Under the terms of the Bargaining Agreements, and Trust Agreements incorporated
5 therein, Defendants are required to pay certain contributions to the Operating Engineers' Vacation,
6 Holiday & Sick Pay Trust Fund; Contract Administration Fund; Job Placement Center and Market Area
7 Committee Administration Market Preservation Fund; Construction Industry Force Account; Operating
8 Engineers Industry Stabilization Trust Fund; Operating Engineers Annuity Fund; and Business
9 Development Trust Fund (including the California Alliance for Jobs) (together referred to herein as
10 "Bargained Entities") and dues to the Union. Plaintiffs' Boards of Trustees have been authorized to
11 collect and distribute monies due to the Bargained Entities as well as dues due to the Union under the
12 Bargaining Agreements and Trust Agreements.

13 13. Under the Bargaining Agreements and Trust Agreements, which are incorporated into the
14 Bargaining Agreements and made binding on Defendants, Defendants are required to regularly pay to
15 ERISA Plaintiffs, the Bargained Entities, and the Union, certain sums of money, the amounts of which
16 are determined by the hours worked by Defendants' employees. Contributions are due on the fifteenth
17 (15th) day of the month following the month in which hours were worked, and are considered
18 delinquent if not received by the twenty-fifth (25th) day of that month. Defendants are also required,
19 pursuant to the Bargaining and Trust Agreements, to pay liquidated damages in the amount of ten
20 percent (10%) for each delinquent contribution, but in the amount of twenty percent (20%) for each
21 delinquent contribution which is the subject of litigation. Moreover, the Bargaining and Trust
22 Agreements provide that interest accrues on delinquent contributions at the rates reasonably set by the
23 Trustees from the date they become delinquent, which is the twenty-sixth (26th) day of the month in
24 which payment was due, until paid in full.

25 14. The Bargaining and Trust Agreements further require Defendants to maintain time
26 records or time cards, and to permit an authorized Trust Fund representative to examine such records of
27 Defendants as are necessary to determine whether Defendants have made full payment of all sums owed
28

1 to ERISA Plaintiffs. Should an audit of Defendants' records reveal Defendants have failed to provide
 2 full and prompt payment of all sums due to Plaintiffs, Defendants must reimburse Plaintiffs for the
 3 amounts due, including audit fees, in addition to any other obligations pursuant to the Bargaining and
 4 Trust Agreements.

5 Factual Allegations

6 15. Defendants have failed and refused to pay amounts found due to Plaintiffs as a result of
 7 an audit of Defendants' payroll records for the period from April 21, 2014 through February 28, 2019.
 8 Liquidated damages and interest have been incurred and are owed to Plaintiffs for the unpaid
 9 contributions for that period.

10 16. Plaintiffs are also entitled to recover any and all other contributions, and all liquidated
 11 damages and interest on delinquent contributions not specified above, found due on timecards, audit, or
 12 otherwise, including estimated contributions for any months Defendants fail to report to Plaintiffs,
 13 through the time of Judgment. Plaintiffs reserve the right to conduct a further audit to determine whether
 14 there are any additional amounts due from Defendants.

15 **FIRST CAUSE OF ACTION** 16 **For Audit Payment, Payment of Delinquent Contributions, Interest, Liquidated Damages,** **Attorneys' Fees and Costs Against Defendants**

17 17. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 16, above.

18 18. Defendants have a contractual duty to timely pay the required contributions to Plaintiffs
 19 and the Bargained Entities, and to timely pay dues to the Union, pursuant to the Bargaining Agreements
 20 and Trust Agreements. Defendants also have a contractual duty under the Bargaining Agreements, and
 21 Trust Agreements incorporated therein to permit an audit of its records to determine whether they are
 22 making full and prompt payment of all sums required to be paid by it to Plaintiffs, and to pay Plaintiffs
 23 all amounts found due as a result of an audit, including audit fees.

24 19. In addition, Defendants have a statutory duty to timely make the required payments to
 25 Plaintiffs under ERISA § 515, 29 U.S.C. § 1145, and LMRA § 301(a).

26 20. By failing to make the required payments to Plaintiffs, Defendants breached the
 27 Bargaining Agreements and Trust Agreements and are in violation of ERISA § 515, 29 U.S.C. § 1145,
 28

1 and LMRA § 301(a).

2 21. Defendants' failure and refusal to pay the required contributions, including the amounts
3 found by audit, plus liquidated damages and interest thereon and on late-paid contributions, was at all
4 times, and still is, willful. Defendants continue to breach the Bargaining Agreements, and incorporated
5 Trust Agreements by failing to pay all amounts owed as alleged. Said refusal is unjustified and done
6 with knowledge and intent.

7 22. ERISA Plaintiffs are without an adequate remedy at law and will suffer continuing and
8 irreparable injury, loss and damage unless Defendants are ordered specifically to perform all obligations
9 required on Defendants' parts to be performed under ERISA, 29 U.S.C. §§ 1101-1381, the LMRA, 29
10 U.S.C. §§ 141-197, and the Bargaining Agreements and Trust Agreements, and are restrained from
11 continuing to refuse to perform as required thereunder.

12 23. This Court is authorized to issue injunctive relief based on the traditional standard. As set
13 forth above, ERISA Plaintiffs have a strong likelihood of success on the merits. There is the possibility
14 that ERISA Plaintiffs' Trust Funds and their participants will suffer irreparable injuries. The balance of
15 hardships and advancement of public interest favor ERISA Plaintiffs.

16 24. This Complaint does not in any manner relate to statutory withdrawal liability that may or
17 may not be assessed against Defendants. ERISA Plaintiffs expressly reserve the right to pursue any such
18 withdrawal liability claims against Defendants as provided by ERISA Plaintiffs' Plan Documents, Trust
19 Agreements, and the law.

20 Prayer

21 WHEREFORE, Plaintiffs pray as follows:

22 1. For a judgment against Defendants as follows:

23 (a) Any unpaid contributions, due at time of Judgment, including those specified
24 above as well as any other contributions determined as due by audit, timecards, or otherwise, including
25 estimated contributions for any months Defendants fail to report to Plaintiffs, pursuant to ERISA §
26 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A);

27 i. To ERISA Plaintiffs and the Bargained Entities, in accordance with
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ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A) and the Bargaining Agreements;

ii. To the Union in accordance with the Bargaining Agreements.

(b) Liquidated damages on all late-paid and unpaid contributions in an amount provided for under the Bargaining and Trust Agreements, and with respect to ERISA Plaintiffs, ERISA § 502(g)(2)(c), 29 U.S.C. § 1132(g)(2)(c).

(c) Interest on all late-paid and unpaid contributions at the rates set in accordance with the Bargaining Agreements, the Trust Agreements, and ERISA § 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B).

2. Plaintiffs' reasonable attorneys' fees and costs of this action, including any audit fees, in accordance with ERISA § 502(g)(2)(D) and (E), 29 U.S.C. § 1132(g)(2)(D) and (E); and in accordance with the Bargaining Agreements for all Bargained Entities; and with LMRA § 301, 29 U.S.C. § 185, for all Plaintiffs.

3. For an order,

(a) requiring that Defendants comply with their obligations to Plaintiffs under the terms of the Bargaining Agreements and the Trust Agreements;

(b) enjoining Defendants from violating the terms of those documents and of ERISA; and

(c) enjoining Defendants from disposing of any assets until said terms have been complied with, and from continuation or operation of Defendants' business until said terms have been complied with.

4. That the Court retain jurisdiction of this case pending compliance with its orders.

5. For such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

SALTZMAN & JOHNSON LAW CORPORATION

By: /s/Matthew P. Minser

Matthew P. Minser

Attorneys for Operating Engineers' Health And
Welfare Trust Fund for Northern California, et al.